Supreme Court, U.S.
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No. 91-1461

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

RICK MARTIN,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

ON A PETITON FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING THE PETITION

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QUESTIONS PRESENTED

1. Does this Honorable Court have jurisdiction to review the judgment of an intermediate appellate court where the petition did not request that a writ be issued to that court; does this Court have jurisdiction to review a federal constitutional claim by a state convict which is raised for the first time in this Court; does this Court have jurisdiction to review a decision which was not presented to the highest state court in a manner which would have permitted that court to review that decision; and does this Court have jurisdiction to review the state court's decision on an issue of state law?

2. Does this case merit review where the federal question raised by the Petitioner was not presented to the state courts, where the decision of the intermediate appellate court does not indicate that the decision was based upon

federal law but rather indicates that it was based upon state law, where the decision is of no importance except to the parties to this cause, and where no conflict has been demonstrated with other decisions of relevant courts?

TABLE OF CONTENTS

	PAGE
Questions Presented.....	i
Table of Contents.....	iii
Table of Authorities.....	iv
Opinions Below.....	1
Jurisdiction.....	1
Constitutional Provisions Involved.....	1
Statutes Involved.....	2
Statement of the Case.....	3
Summary of the Argument.....	11
Argument:	
I. THIS COURT DOES NOT HAVE JURISDICTION IN THIS CASE.....	13
II. THIS CASE DOES NOT MERIT REVIEW BY THIS COURT.....	22
Conclusion.....	26
Appendix.....	A-1

TABLE OF AUTHORITIES

CASES:	PAGE(S)
Aycock v. State, 291 Ala. 49, 277 So.2d 412 (1973).....	16
Banks v. State of California, 395 U.S. 708 (1969).....	15
Beck v. Washington, 369 U.S. 541 (1962).....	20,22
Board of Directors of Rotary International v. Rotary Club, 481 U.S. 537 (1987).....	21
Ex parte Andrews, 406 So.2d 1045 (Ala. 1981)...	16
Ex parte Phelps, 339 So.2d 124 (Ala. 1976)...	16,17
Ex parte Save Our Streams, Inc., 541 So.2d 549 (Ala. 1989).....	16
Ex parte Winchester, 544 So.2d 967 (Ala. 1989)....	16
Exxon Corporation v. Eagerton, 462 U.S. 176 (1983).....	21
Gotthilf v. Sills, 375 U.S. 79 (1963).....	18
Hagood v. State, 588 So.2d 526 (Ala.Crim.App. 1991).....	1,8 9,24

TABLE OF AUTHORITIES (CONT'D)

	PAGE(S)
Harris v. Reed, 489 U.S. 255 (1989).....	10
Interstate Circuit v. Dallas, 390 U.S. 676 (1968).....	13
Johnson v. State, 500 So.2d 494 (Ala.Crim.App. 1986).....	20
Matthews v. Huwe, 269 U.S. 262 (1925).....	13
McMaster v. Gould, 276 U.S. 285 (1928).....	18
Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954)..	13
Randall v. Board of Commissioners, 261 U.S. 252 (1923).....	14
Southern Electric Company v. Beha, 269 U.S. 186 (1925).....	18
Second National Bank of Cincinnati v. First National Bank of Okeana, 242 U.S. 600 (1917).....	14
Wainwright v. Goode, 464 U.S. 78 (1983).....	22
Webb v. Webb, 451 U.S. 493 (1981).....	18,20
Wisconsin Electric Co. v. Dumore Co., 282 U.S. 813 (1931).....	25

TABLE OF AUTHORITIES (CONT'D)

PAGE(S)

CONSTITUTIONAL PROVISIONS:

U.S. CONST. amend. XIV, §1..... 2

STATUTES:

28 U.S.C. §1257.....1,2,12,14, 17, 18

ALA. CODE §12-21-222 (1986).....2, 21

RULES OF COURT:

Alabama Rules of Appellate Procedure,

Rule 39(c).....15,16,17

Rule 39(d).....16

Rule 39(k).....10,16,17

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals is reported sub nom. Hagood v. State at 588 So.2d 526 (Ala.Crim. App. 1991). Both that court's order denying rehearing and the decision by the Alabama Supreme Court denying the Petitioner's petition for writ of certiorari also are reported at 588 So.2d 526.

JURISDICTION

The Petitioner alleges that this Court has jurisdiction under 28 U.S.C. §1257. The Respondent disputes this allegation, for the reasons discussed herein. The order of the Alabama Supreme Court denying discretionary review was entered on November 22, 1991.

CONSTITUTIONAL PROVISIONS INVOLVED

The petition addresses questions that allegedly involve the Due Process Clause of

the Fourteenth Amendment to the United States Constitution. Section 1 of the Fourteenth Amendment is set forth verbatim in the Petition For Writ of Certiorari.

STATUTES INVOLVED

28 U.S.C. §1257-State courts; certiorari

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes or, or any commission held or authority exercised under, the United States.

ALA. CODE §12-21-222 (1986) - Accomplice's testimony for felony conviction

> A conviction of felony cannot be had on the testimony of an accomplice unless corroborated by

other evidence tending to connect the defendant with the commission of the offense, and such corroborative evidence, if it merely shows the commission of the offense or the circumstances thereof, is not sufficient. (Code 1852, §641; Code 1867, §4193; Code 1876, §4895; Code 1886, §4476; Code 1896, §5300; Code 1907, §7897; Code 1923, §5635; Code 1940, T. 15, §307.)

STATEMENT OF THE CASE

For the purposes of this brief, the Respondent accepts the Petitioner's Statement of the Case, which was taken from the opinion of the Alabama Court of Criminal Appeals, as substantially accurate, with the following exceptions, corrections and additions:

When Anthony Simmons first talked with defendants Hagood and Martin on August 28, 1988, about getting some more marijuana for Jimmy Lindsey, Hagood initially said that he and Martin could probably get some. Hagood and Martin later said that they

would get the money already owed by Simmons from Lindsey, and that they might have to "whip [Lindsey's] ass" if he could not come up with the money. They both also told Simmons to tell Lindsey that they had some marijuana. They said that they would meet Simmons at Simmons' house at 7:00 p.m., and that they would talk more about the proposed marijuana deal then. (R. 481-487, 521, 532)

The $500 that Lindsey subsequently borrowed from Elbert Clements was in three $100 bills and ten $20 bills. (R. 437) Lindsey always carried a wallet, and he always had two silver coins in that wallet. One of the coins was a silver dollar, and the other was a smaller round coin. (R. 848-851) When Hagood was arrested the morning after Lindsey was killed, he had two $100 bills and three $20 bills in his wallet, and he also had two silver dollars in his pocket. (R. 578-579,

788-789, 816-817) Hagood was not employed at the time. (R.829) Lindsey's wallet was never found. (R.831, 849)

When Simmons and Lindsey got to where Simmons had left Hagood and Martin on the night Lindsey was killed, Simmons found that the defendants' car had been backed down a little road that connected with the gravel road near where he had left the defendants. It was dark outside. (R. 503-504)

Simmons was bent over inside his car lighting a cigarette when he heard Lindsey yell, "Oh, shit." (R. 511, 512) Simmons immediately went back to the defendants' car, where he found Lindsey lying face up on the ground, making gurgling noises. Martin was towards Lindsey's face on one side of Lindsey, and Hagood was towards Lindsey's feet on Lindsey's other side. (R. 511, 512)

Both Hagood and Martin then asked

Simmons where the money was. Simmons told them it was in Lindsey's pants. Hagood then told Simmons to help Martin drag Lindsey off, but Simmons refused. Martin then told Simmons to help him drag Lindsey, but Simmons again refused. Simmons then went over to his car. Martin took the money from Lindsey's pants, and Martin and Hagood dragged Lindsey off. (R. 511, 524) (There is no evidence whatsoever in the record to support the statement in the Court of Criminal Appeals' opinion that Simmons got the money from the victim and gave it to Martin. The only testimony on this point indicated that Martin personally took the money from Lindsey.)

Shortly after Lindsey was stabbed, a car that did not have its lights on was observed speeding down Highway 24. It was traveling away from the area where Lindsey had been stabbed and towards Hagood's home. After about twenty minutes, the

vehicle was stopped by a Moulton, Alabama, police officer. The passenger in the car was Hagood. Although the police officer was not able to positively identify Martin as the driver, he testified that the driver had a driver's license that identified him as Rick Martin, and that he believed that defendant Martin was the Rick Martin who was driving the car that he stopped that night. (R. 587-595, 596-601, 603) Hagood and Martin told the police officer that their lights were not on because the alternator was going out. (R. 600)

When Martin was found two months after the stabbing, he was in the trailer of a woman whose last name was Hagood who indicated that she was related to Martin by marriage. (R. 900-904, 906, 907-909)

Martin only raised three issues on appeal. His first argument was that Simmons was an accomplice under Alabama law, and that his conviction therefore was

improper under Alabama law because there was insufficient evidence corroborating Simmons' testimony. The Alabama Court of Criminal Appeals disagreed, finding that Alabama law did not require corroboration of Simmons' testimony because whether Simmons was an accomplice was a question for the jury to determine under Alabama law, and there was sufficient evidence from which the jury could decide that Simmons was not an accomplice to the crime. Hagood v. State, 588 So.2d at 536 (Appendix to the Petition, at 33-36)

Martin's second argument on appeal was that the trial court had erred in failing to give three jury instructions he had requested which allegedly addressed the differences between felony murder and capital murder under Alabama law. The Court of Criminal Appeals found that this issue had not been preserved for appellate review. Hagood v. State, 588 So.2d at

536-537, and 533 (Appendix to the Petition, at 36-38).

Martin's final argument on appeal was that there was insufficient evidence of intent to kill on Martin's part to support his conviction under Alabama law. In making this argument, Martin relied upon matters such as a lack of evidence of intent to kill prior to going to the scene of the crime, the alleged unlikeliness that he and Hagood undertook to intentionally kill Lindsey when someone else was present, and the lack of testimony to contradict Hagood's account that Lindsey struck the first blow. The Court of Criminal Appeals decided that the evidence raised a question for the jury and that there was evidence from which the jury could conclude that Martin had the prerequisite intent. Hagood v. State, 588 So.2d at 537 (Appendix to the Petition, at 38-40).

Martin filed a timely application for

rehearing following the decision of the Court of Criminal Appeals in which he repeated the identical arguments he had originally submitted to that Court. Martin did not make a motion pursuant to Rule 39(k), Alabama Rules of Appellate Procedure, for the finding of any facts upon rehearing contrary to or in addition to the facts stated in the opinion of the Court of Criminal Appeals. (The only Rule 39(k) motion in this case was filed by the State, in connection with its application for rehearing attempting to secure clarification, in light of this Court's decision in Harris v. Reed, 489 U.S. 255 (1989), regarding some of the issues Hagood had raised on appeal. It is the State's Rule 39(k) motion that is referred to in Appendix D to the Petition; a single notification concerning all three applications for rehearing in this case was provided by the Court of Criminal Appeals.)

After denial of his application for rehearing, Martin submitted a petition for writ of certiorari to the Alabama Supreme Court. Martin asked the Alabama Supreme Court to review the decision of the Court of Criminal Appeals on two of the issues he had presented to that Court, to wit: 1) whether Simmons was an accomplice as a matter of law under Alabama law whose testimony had to be corroborated under Alabama law; and 2) whether there was sufficient evidence of intent to kill on Martin's part to support his conviction under Alabama law (this argument was verbatim the argument Martin had submitted to the Court of Criminal Appeals).

SUMMARY OF THE ARGUMENT

This Court does not have jurisdiction to review the decision of the Alabama Supreme Court because that decision is not a final judgment of the highest state court

within the meaning of 28 U.S.C. §1257. The Petitioner did not request that a writ of certiorari be issued to the Alabama Court of Criminal Appeals. This Court also does not have jurisdiction because the Alabama Supreme Court was not given a fair opportunity to review the decision of the Alabama Court of Criminal Appeals, the federal question upon which the Petitioner seeks review was never presented to the state appellate courts, and the issues decided by the Alabama Court of Criminal Appeals were issues involving state law only.

Even if this Court does have jurisdiction, it should deny the petition because the state court decision in question does not merit review by this Court. The federal question raised was not presented to or decided by the state court. The decision of the Alabama Court of Criminal Appeals appears to be based solely upon

state law. The case was not presented to the Alabama Supreme Court in a manner which permitted that court to review the decision of the Court of Criminal Appeals. The decision has no adverse precedential value. It is not in conflict with prior decisions of this Court or of other relevant courts, and it is of no importance except to the parties to this cause.

ARGUMENT

I. THIS COURT DOES NOT HAVE JURISDICTION IN THIS CASE.

The Petitioner has asked this Court to issue a writ of certiorari to the Alabama Supreme Court. This Court clearly has no jurisdiction to do this because the Alabama Supreme Court only entered an order in this case declining to grant discretionary review. Interstate Circuit v. Dallas, 390 U.S. 676, 678 n.1 (1968); Matthews v. Huwe, 269 U.S. 262, 263-265 (1925); Michigan-

Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 159-160 (1954); Second National Bank of Cincinnati v. First National Bank of Okeana, 242 U.S. 600 (1917); and Randall v. Board of Commissioners, 261 U.S. 252 (1923).

On the basis of the foregoing authority, the Respondent respectfully submits that the instant petition should be dismissed for lack of jurisdiction because the Petitioner has sought a writ of certiorari directed only toward a state court whose decision was not a final judgment of the highest state court in which a decision could be had within the meaning of 28 U.S.C. §1257. The Petitioner has not requested that a writ be directed to the Alabama Court of Criminal Appeals.

If the Respondent is mistaken, and this Court may issue a writ to the Alabama Court of Criminal Appeals despite the fact that the Petitioner did not request such a

writ, then the Respondent submits that this Court still lacks jurisdiction to do this.

The decision of an intermediate state appellate court is not a final judgment rendered by the highest state court in which a decision could be had, and this Court lacks jurisdiction to review that decision, where the Petitioner did not ask the highest state court to review the judgment of the intermediate appellate court. Banks v. State of California, 395 U.S. 708 (1969). Although Martin asked the Alabama Supreme Court to review the decision of the Court of Criminal Appeals, he did not provide the Alabama Supreme Court with any real opportunity to review the decision.

A writ of certiorari may be granted by the Alabama Supreme Court only upon the filing of a petition which alleges a ground for review in accordance with the requirements of Rule 39(c), Alabama Rules of

Appellate Procedure. Ex parte Andrews, 406 So.2d 1045 (Ala. 1981); Rule 39(c) and (d), A.R.A.P.; and Aycock v. State, 291 Ala. 49, 277 So.2d 412, 413 (1973). Furthermore, in determining whether certiorari should be granted, the Alabama Supreme Court is limited to the facts stated in the opinion of the Court of Criminal Appeals unless the petitioner made a request for the finding of additional or corrected facts in connection with his application for rehearing, pursuant to Rule 39(k), Alabama Rules of Appellate Procedure. Ex parte Phelps, 339 So.2d 124 (Ala. 1976); Rule 39(k), A.R.A.P.; Ex parte Save Our Streams, Inc., 541 So.2d 549, 550-552 (Ala. 1989); and Ex parte Winchester, 544 So.2d 967, 968 (Ala. 1989).

Martin did not file a proper petition for writ of certiorari in the Alabama Supreme Court. He relied upon Rule 39(c)(4), Alabama Rules of Appellate

Procedure, as his ground for review but he did not allege a conflict with prior appellate decisions as required by that Rule. Under Rule 39(c)(4), a petition must quote the conflicting parts of the decisions in question or state specifically and with particularity wherein the decision in question is conflicting with a prior decision or decisions. Ex parte Phelps, 339 So.2d at 124; and Rule 39(c)(4), A.R.A.P. Although Martin stated that a conflict existed, no conflict was apparent in the petition.

Martin also did not make a Rule 39(k) request in conjunction with his application to the Court of Criminal Appeals for rehearing. Thus, under Alabama appellate practice, the Alabama Supreme Court could not consider any facts different from or in addition to those stated in the opinion of the Court of Criminal Appeals.

Under 28 U.S.C. §1257, this Court does

not have jurisdiction except to review judgments rendered by the highest state court in which a decision could be had. Since Martin did not make a proper request for review of the decision of the Court of Criminal Appeals, the Alabama Supreme Court could only deny the petition that was filed. Since Martin did not properly seek review of the decision of the Court of Criminal Appeals, this Court does not have jurisdiction to review that opinion. See Southern Electric Company v. Beha, 269 U.S. 186 (1925); Gotthilf v. Sills, 375 U.S. 79 (1963); and McMaster v. Gould, 276 U.S. 285 (1928).

Furthermore, in order for this Court to have jurisdiction over an issue under 28 U.S.C. §1257, the issue must have been adequately presented to the state courts for resolution. Webb v. Webb, 451 U.S. 493, 496-497 (1981). It is difficult to discern exactly what Martin is presenting

as his issue in this case, but he clearly is claiming a violation of his right to due process involving the sufficiency of the evidence in light of state law requiring corroboration of an accomplice's testimony, and also in light of the trial court's instruction to the jury not to apply certain testimony against Martin. In the body of the petition, it appears that Martin is arguing that the trial court erred in refusing to grant him a severance during the middle of the trial.[1] None of these arguments were presented to the state

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[1]Martin claims that this was erroneous because, unless the trial court's admonition to the jury to disregard certain testimony was effective, he was deprived of his right of confrontation as he had no opportunity for cross-examination. It would be inappropriate to address the merits of this contention at this point, but the Respondent is compelled to point out that Martin was not deprived of his right of confrontation since the declarant, Hagood, did testify and was subject to cross-examination.

appellate courts.

On appeal, Martin argued that Simmons was an accomplice as a matter of state law and that, therefore, his conviction required corroborating testimony. He also argued that there was insufficient evidence of intent to kill. Neither of these arguments were presented as federal constitutional matters. They were presented strictly as matters of state law. Also, no question concerning the trial court's refusal of a severance was presented for appellate review.

Alabama courts deem issues which are not both argued and supported by legal authority on appeal to be waived. Johnson v. State, 500 So.2d 494, 498 (Ala.Crim.App. 1986). See Webb, 451 U.S. at 498; and Beck v. Washington, 369 U.S. 541, 553 (1962). Where, as here, the state appellate court did not address a federal question, it is

presumed that the issue was not properly presented to it. Exxon Corporation v. Eagerton, 462 U.S. 176, 181 n. 3 (1983); and Board of Directors of Rotary International v. Rotary Club, 481 U.S. 537, 550 (1987). Since Martin did not present the federal issues raised in his petition to the state courts for resolution, this Court does not have jurisdiction to consider those issues.

Finally, this Court does not have jurisdiction over issues involving only the application of state law. It is apparent from the body of the petition that Martin disagrees with the Court of Criminal Appeals' decision that ALA. CODE §12-21-222 (1986) was not applicable in this case, and that he is asking this Court to find, contrary to the decision of the Court of Criminal Appeals, that this statute did apply. In other words, his insufficiency of the evidence argument is premised upon

arguing that the Court of Criminal Appeals erred as a matter of state law in deciding that there was sufficient evidence that witness Simmons was not an accomplice that corroboration of his testimony was not required as a matter of law. The Court of Criminal Appeals' interpretation of this state statute followed the Alabama Supreme Court's interpretation of this statute, and this interpretation is binding on this court. Wainwright v. Goode, 464 U.S. 78, 83-84 (1983). This court does not have jurisdiction over this state law issue. Beck v. Washington, 369 U.S. at 554-555.

II. THIS CASE DOES NOT MERIT REVIEW BY THIS COURT.

This Court's time usually and properly is devoted to federal questions requiring resolution either because of their unique nature and public importance, or because a serious conflict exists, either between the

decision in question and prior decisions of this Court or among the lower courts in general. None of these considerations mitigating in favor of review by this Court exist in this case.

As discussed above, the federal question(s) which Martin asks this Court to consider were never presented to or decided by the state appellate courts. Thus, this case does not involve a federal issue decided by the highest state court. This Court should not undertake to review such a case, and there is no valid reason to accept this case for review. Martin not only did not present the federal questions he now raises to the state appellate courts, he did not even present the state law issues actually decided by the intermediate state appellate court to the highest state court in a fashion effectively permitting review of those issues.

There is no error apparent on the face

of the opinion of the Court of Criminal Appeals in this case, and the decision by the Court of Criminal Appeals does not have any particular precedential value. The Court decided that Simmons was not an accomplice as a matter of law under Alabama law, that Martin had not preserved his issue concerning the denial of certain jury instructions, and that sufficient evidence was presented to create a jury question on the issue of whether Martin had the requisite intent to kill. Hagood v. State, 588 So.2d at 536-537 (Appendix to the Petition, at 33-40).

The actual sufficiency of the evidence of Martin's intent to kill is not an important issue requiring decision by this Court. Accepting a case such as this for review would start this Court on an unending process of examining the facts in each case in which a sufficiency of the evidence claim is raised in order to

determine whether this Court agrees as to the sufficiency of the evidence.

To warrant review based upon an allegation of a conflict, there must demonstrably be a direct and irreconcilable conflict with other applicable authority. No conflict with any applicable decision is demonstrated by the petition. See Wisconsin Electric Co. v. Dumore Co., 282 U.S. 813 (1931).

The Petitioner has not asked this Court to do anything but determine that an error was made under the facts in his case, and he has not demonstrated that a decision in this case would affect anyone but himself. This case does not warrant review by this Court.

CONCLUSION

On the basis of the foregoing, the Respondent submits that the petition is due to be denied.

Respectfully submitted,

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APPENDIX

ALABAMA RULES OF APPELLATE PROCEDURE

RULE 39. REVIEW OF DECISIONS OF COURTS OF APPEAL.

(a) Method. In the case of a pre-trial appeal by the state in a criminal case (see Rule 17, Temporary Alabama Rules of Criminal Procedure; Rule 15.7, Alabama Rules of Criminal Procedure, as of January 1, 1991), either party may petition for writ of certiorari without having first applied for a rehearing in the court of criminal appeals. In the case of a proceeding pursuant to Rule 21(e), Alabama Rules of Appellate Procedure, an application for rehearing in the court of appeals is not a prerequisite for review in the supreme court.

In all other cases, decisions of the courts of appeals may be reviewed by the supreme court upon petition for writ of certiorari only after a court of appeals has overruled an application for rehearing directed to the point, issue, or decision

complained of. (For the procedure to be followed for the filing of an application for rehearing where no facts are stated by the court of appeals, or where the applicant is not satisfied with the statement of facts in the opinion of the court of appeals, see subsection (k) of this rule.)

Payment of the amount prescribed in Rule 35A(3) shall be made to the clerk of the supreme court at the time the petition for writ of certiorari is filed.

(b) Time. The petition for writ of certiorari, with an accompanying brief, shall be filed with the clerk of the supreme court pursuant to Rule 25(a), within 14 days (two weeks) after the decision of the court of appeals on the application for rehearing, except that in the case of a pre-trial appeal by the state in a criminal case, a petition for writ of certiorari must be filed within seven days

(one week) of that court's order overruling an application for rehearing.

(c) Grounds. The petition for writ of certiorari to this court in a criminal case in which the death penalty was imposed as punishment shall be filed by counsel representing the petitioner on the appeal of the case, and will be granted as a matter of right. Unless counsel who represented the appellant on the original appeal has been replaced by new or additional counsel, he shall prepare the petition for the writ of certiorari and file the same in accordance with these rules. If new or different counsel has been appointed to represent the appellant, it shall be his duty to prepare the petition for writ of certiorari and file the same in accordance with these rules. In all other cases, civil or criminal, petitions for writs of certiorari will be considered only:

(1) From decisions initially holding valid or invalid a city ordinance, a state statute or a federal statute or treaty, or initially construing a controlling provision of the Alabama or federal Constitution;

(2) From decisions that affect a class of constitutional, state or county officers;

(3) From decisions where a material question requiring decision is one of first impression in Alabama;

(4) From decisions in conflict with prior decisions of the United States Supreme Court, the Alabama supreme court, or the Alabama courts of appeals; provided that when (4) is the basis of the petition, it must quote that part of the opinion of the appropriate court of appeals, and that part of the prior decision with

which the conflict is alleged; or it shall state specifically and with particularity wherein such decision is in conflict; and,

(5) Where petitioner seeks to have controlling supreme court cases overruled which were followed in the decision of the court of appeals.

(d) Form of petition. The petition shall be on letter-size paper and shall contain:

(1) The style of the case (the same as in the court of appeals), the name of the petitioner, the circuit court from which the cause is on appeal, and the name of the court of appeals to which the petition for certiorari is directed;

(2) The date of the decision sought to be reviewed and the date of the order overruling the application for rehearing; and

(3) The concise statement of the grounds, (c)(1)-(5), supra, on which the petition is based.

A copy of the opinion of the court of appeals shall be attached to the petition as an exhibit. ...

(k) Scope of review. The review shall be that generally employed by certiorari and will ordinarily be limited to the facts stated in the opinion of the particular court of appeals. If the petitioner is not satisfied with that statement of facts, he may, on application for rehearing in that court, present any additional or corrected statement of facts and request that court to add or correct those facts in its opinion on rehearing. If the court fails to accede to the request, petitioner may copy the statement in the petition to this court, with references therein to the pertinent portions of the clerk's record and

reporter's transcript, and it will be considered along with the statement of facts in the opinion of the appellate court, if found to be correct.

The application of the law to the stated facts is included in the scope of review.

In all cases in which the death penalty has been imposed, upon review of the opinion of the court of criminal appeals on certiorari, the supreme court may notice any plain error or defect in the proceeding under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial rights of the petitioner.

ALABAMA RULES OF APPELLATE PROCEDURE

RULE 40. APPLICATIONS FOR REHEARING.

The application for rehearing may be made separately or may be included at the beginning of the applicant's brief. (NOTE: Except as to pre-trial appeals by the state in criminal cases, in order for a party to secure certiorari review by the supreme court it is necessary that that party have filed an application for rehearing in the court of appeals. If the court of appeals has ruled without stating facts, or has given what the rehearing applicant considers an incorrect or inadequate statement of the facts, then the applicant must, on application, also make a request pursuant to Rule 39(k) in order to seek certiorari reivew later.) All applications for rehearing, and the briefs supporting the applications, must be filed with the clerk of the court within 14 days (two weeks) after the rendition of the judgment,

except that in the case of a pre-trial appeal by the state in a criminal case, any application for rehearing, with the supporting brief, must be filed with the clerk of the court within seven days (one week) after the rendition of the judgment. No party can, as a matter of right, apply for a rehearing unless a brief was filed with the clerk as provided by the rules. No brief opposing the application is required, but a brief from the opposing party may be filed within 14 days (two weeks) -- or, in the case of a pre-trial appeal by the state in a criminal case, within seven days (one week) -- after the filing of the original application and brief. No second application for rehearing will be considered unless the rehearing reversed or substantially modified the original opinion of the court.